(3)

Supreme Court, U.S.
FILED
JUL 28 1999
OFFICE OF THE CLERK

No. 98-1836

In the Supreme Court of the United States

UNITED STATES HEALTHCARE SYSTEMS OF PENNSYLVANIA, INC.,

Petitioner,

v.

PENNSYLVANIA HOSPITAL INSURANCE CO. AND THE COMMONWEALTH OF PENNSYLVANIA MEDICAL PROFESSIONAL LIABILITY CATASTROPHE LOSS FUND,

Respondents.

On Petition For A Writ Of Certiorari To The Pennsylvania Supreme Court

---

REPLY BRIEF FOR PETITIONER

BURT M. RUBLIN
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street
Philadelphia, PA 19103
(215) 665-8500

ROY T. ENGLERT, JR.
Counsel of Record
SHARON SWINGLE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioner

158

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE DECISION BELOW IS A "FINAL JUDGMENT" THAT THIS COURT HAS JURISDICTION TO REVIEW 1

II. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THE COURTS OF APPEALS AND THIS COURT 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Bast v. *Prudential Ins. Co. of Am.*, 150 F.3d 1003 (9th Cir. 1998) 6

Belknap v. *Hale*, 463 U.S. 491 (1983) 4, 5

Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) 1

Corcoran v. *United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir.), cert. denied, 506 U.S. 1033 (1992) 10

Cox Broad. Corp. v. *Cohn*, 420 U.S. 469 (1975) . . . . *passim*

Dukes v. *U.S. Healthcare, Inc.*, 57 F.3d 350 (3d Cir.), cert. denied, 516 U.S. 1009 (1995) 6

Engelhardt v. *Paul Revere Life Ins. Co.*, 139 F.3d 1346 (11th Cir. 1998) 6

Fort Wayne Books, Inc. v. *Indiana*, 489 U.S. 46 (1989) . . . 4

Goodyear Atomic Corp. v. *Miller*, 486 U.S. 174 (1988) 3, 4, 5

Hohn v. *United States*, 524 U.S. 236 (1998) 9

Hudson Distribs., Inc. v. *Eli Lilly & Co.*, 377 U.S. 386 (1964) 4

Huss v. *Green Spring Health Servs., Inc.*, 1999 U.S. Dist. LEXIS 5101 (E.D. Pa. April 16, 1999) . . . 6

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 10

Jefferson v. *City of Tarrant*, 522 U.S. 75 (1997) 5

Local No. 438 Constr. & Gen. Laborers' Union v. *Curry*, 371 U.S. 542 (1963) 4

Market Street Ry. Co. v. *Railroad Comm'n*, 324 U.S. 548 (1945) 5

Mercantile Nat'l Bank v. *Langdeau*, 371 U.S. 555 (1963) . . 4

TABLE OF AUTHORITIES - Continued

Page(s)

Metropolitan Life Ins. Co. v. *Massachusetts*, 471 U.S. 724 (1985) 8

Miami Herald Publ'g Co. v. *Tornillo*, 418 U.S. 241 (1974) . 4

Mississippi Power & Light Co. v. *Mississippi*, 487 U.S. 354 (1988) 3, 4

National Socialist Party of Am. v. *Skokie*, 432 U.S. 43 (1977) 4

New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Ins. Co.*, 514 U.S. 645 (1995) . . . . . *passim*

Organization for a Better Austin v. *Keefe*, 402 U.S. 415 (1971) 4

Painter v. *Golden Rule Ins. Co.*, 121 F.3d 436 (8th Cir.1997), cert. denied, 523 U.S. 1074 (1998) 6

Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 8, 9

Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945) 5

Shaffer v. *Heitner*, 433 U.S. 186 (1977) 4

Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 2, 8

Southland Corp. v. *Keating*, 465 U.S. 1 (1984) 4

Turner v. *Fallon Community Health Plan, Inc.*, 127 F.3d 196 (1st Cir. 1997), cert. denied, 523 U.S. 1072 (1998) 6

Statutes

29 U.S.C. § 1001(a) 2, 3

Section 502(a) of ERISA, 29 U.S.C. § 1132(a) 6, 7

Section 514 of ERISA, 29 U.S.C. § 1144 9

TABLE OF AUTHORITIES - Continued

Page(s)

Section 514(a) of ERISA, 29 U.S.C. § 1144(a) . . . . . *passim*

Miscellaneous

120 CONG. REC. 29197 (1974) 2

145 CONG. REC. S8524 (daily ed. July 14, 1999) 9, 10

Patients' Bill of Rights Act of 1999 (S. 1344) 9

H.R. REP. NO. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639 2

S. REP. NO. 93-127 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4838 2

William A. Chittenden III, *Malpractice Liability and Managed Health Care: History and Prognosis*, 26 TORT & INS. L.J. 451 (1991) 3

Karen A. Jordan, *Travelers Insurance: New Support for the Argument to Restrain ERISA Preemption*, 13 YALE J. ON REG. 255, 304 (1996) 8

Petitioners' Reply Brief, 1997 WL 471826, *Jefferson v. City of Tarrant*, No. 96-957 (U.S. Aug. 15, 1997) . 5

REPLY BRIEF FOR PETITIONER

As we showed in the petition, lower courts and commentators alike have observed that ERISA preemption of medical malpractice actions against HMOs is a difficult subject that has yielded inconsistent decisions and cries out for clarification by this Court. Yet respondents join the Supreme Court of Pennsylvania in asserting that the issue is really quite easy, because this Court deprived all its earlier case law of any precedential force in one fell swoop, without overruling it, when it decided the line of ERISA preemption cases that began with *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 645 (1995). That facile assertion leads respondents into not just one error, but two: to try to defeat jurisdiction, they deny that there is even a possibility that "refusal immediately to review the state court decision might seriously erode federal policy" (*Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 483 (1975)); and, to try to defeat review on the merits of the remarkable decision below, they deny that the pre-*Travelers* decisions have any remaining force and that the evident disarray in the circuits really exists. In all of these arguments, respondents are entirely incorrect.

I. THE DECISION BELOW IS A "FINAL JUDGMENT" THAT THIS COURT HAS JURISDICTION TO REVIEW

Respondents claim that this Court lacks jurisdiction to review the decision of the Pennsylvania Supreme Court because further proceedings are pending in state court. Opp. 3. Their argument ignores this Court's teaching that finality is to be given a "practical rather than a technical construction," *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), and disregards the vital federal interests threatened by a denial of immediate review.

Immediate review of a decision by the highest court in a state is proper notwithstanding ongoing state-court proceedings if (i) the federal issue in question has been finally decided; (ii) "the party seeking review [in this Court] might prevail on the merits on non-federal grounds [in state court], thus rendering unnecessary review of the federal issue"; (iii) reversal of the state court would preclude further litigation on the cause of action; and (iv) "refusal

immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-483.

The first three of those requirements are undisputedly met. The federal question presented — whether Section 514(a) of ERISA preempts state law claims arising from an HMO's alleged negligence in administering benefits under an ERISA-governed health plan — has been finally decided by the highest court in Pennsylvania. Pet. App. 1a-16a. If certiorari is denied, petitioner might prevail in state trial court on nonfederal grounds, such as a finding that petitioner's conduct was not negligent. Reversal of the Pennsylvania Supreme Court's decision that the state law claims against petitioner are not preempted by ERISA would bar prosecution of those causes of action.

Despite respondents' contention to the contrary (at Opp. 3), denying immediate review poses a serious risk of "erod[ing] federal policy." The decision of the Pennsylvania Supreme Court threatens fundamental alteration of the structure and function of a regulatory scheme on which "the continued well-being and security of millions of employees and their dependents" rely. 29 U.S.C. § 1001(a). The ERISA scheme, which reflects a finely wrought compromise among employers, employees, insurers, and providers, demands "uniformity of decision [in order to] help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." H.R. REP. NO. 93-533, at 12 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4650; accord S. REP. NO. 93-127, at 35 (1973) (it is "essential to provide for a uniform source of law" to govern ERISA plans in order to avoid the confusion and inefficiency attendant to state regulation), *reprinted in* 1974 U.S.C.C.A.N. 4838, 4871. Congress's decision to mandate application of a uniform, federal body of law to employee benefit plans has been characterized as the "crowning achievement of th[e] legislation * * * round[ing] out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983) (quoting 120 CONG. REC. 29197 (1974) (comments of Representative Dent)).

Delayed review of the decision below — which sanctions direct and indirect state regulation of administration of ERISA plan bene-

fits — could have significant adverse consequences. With the blessing of the Pennsylvania Supreme Court, both individual litigants and state regulators could seek state-law sanctions for alleged misadministration of ERISA plan benefits. ERISA plan administrators, facing exposure to state tort liability and significant uncertainty given inconsistent state and federal preemption decisions (see Pet. 13-18), would have strong incentives to adopt a state-by-state approach to plan administration. The corresponding costs would be passed on to the consumer or lead to rapid and unnecessary depletion of plan assets. See William A. Chittenden III, *Malpractice Liability and Managed Health Care: History and Prognosis*, 26 TORT & INS. L.J. 451, 489 n.193 (1991). That chain of events would frustrate the express purpose of ERISA to secure "the soundness and stability of plans with respect to adequate funds to pay promised benefits." 29 U.S.C. § 1001(a).

In similar circumstances, this Court has repeatedly applied *Cox* to grant immediate review. In *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988), for example, the Court considered whether a decision by the Federal Energy Regulatory Commission allocating the cost of constructing a nuclear power plant among four utility companies preempted a state regulator from examining the prudence of constructing the plant. *Id.* at 356. The state supreme court had held that a prudence inquiry by state regulators was not preempted and remanded the case to the state regulators to conduct such an inquiry. See *id.* at 368. Despite the pendency of state proceedings, this Court held that the decision below was "final" under *Cox*: "The critical federal question — whether federal law pre-empts such [state regulatory] proceedings while the FERC order remains in effect — has * * * already been answered by the State Supreme Court and its judgment is therefore ripe for review." *Id.* at 370 n.11.

Similarly, in *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988), the Court granted certiorari to decide whether the State of Ohio violated the Supremacy Clause by subjecting a private contractor operating a federally owned nuclear production facility to a state workers' compensation law giving employees higher awards for injuries resulting from a violation of state safety regulations. *Id.* at 176. The Ohio Supreme Court had held that federal law did not preempt Ohio from applying state safety requirements to

nuclear facilities; accordingly, the state industrial commission was ordered to consider the merits of the employee's claim. See *id.* at 177-178. Despite the pendency of those state proceedings, immediate review was granted under *Cox*. As the Court emphasized, leaving the Ohio Supreme Court's decision unreviewed threatened to undermine vital federal policies. *Id.* at 179. The state-court decision "sanction[ed] direct state regulation" of the nuclear facility involved in the case and had "important implications for the regulation of federally owned nuclear production facilities in other States." *Id.* at 179-180.

Mississippi Power & Light and *Goodyear Atomic* are just recent examples of a long line of cases granting immediate review of state-court preemption decisions despite pending state proceedings. In *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-7 (1984), this Court applied *Cox* to review a state-court decision that the Federal Arbitration Act did not preempt state law claims under the California Franchise Investment Law; although the claims had not yet been tried on the merits, this Court recognized the state court's decision as "final." And in *Belknap* v. *Hale*, 463 U.S. 491, 497 n.5 (1983), and *Local No. 438 Construction & General Laborers Union* v. *Curry*, 371 U.S. 542, 549-551 (1963), this Court reviewed state-court decisions regarding the preemptive scope of the National Labor Relations Act even though both state-court decisions contemplated further proceedings below.[1]

Respondents' sole argument about the fourth *Cox* factor is that delayed review poses no risk of "seriously erod[ing] federal policy" because the decision below "is in accordance with your Court's decisions, and thus consistent with federal policy." Opp. 5. That as-

---

[1] The flexible approach to finality ratified in *Cox* and invoked here has also been applied repeatedly in non-preemption contexts. See, *e.g.*, *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55-57 (1989); *Shaffer* v. *Heitner*, 433 U.S. 186, 195 n.12 (1977); *National Socialist Party of Am.* v. *Skokie*, 432 U.S. 43, 44 (1977); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 246-47 & n. 6 (1974); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418 n.1 (1971); *Hudson Distribs., Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 (1964); *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 557-58 (1963).

sertion is incorrect (see pp. 8-9, *infra*); more important, it is irrelevant. Respondents' analysis — which would require this Court to decide the merits of a claim ***before*** deciding whether it has jurisdiction to conduct such an inquiry — misses the mark entirely. This Court has granted immediate review on the grounds that an unreviewed state-court decision on preemption "might seriously erode federal policy" in cases in which ***it affirmed the state court's decision***. See, *e.g.*, *Goodyear Atomic*, 486 U.S. at 178-180, 186; *Belknap*, 463 U.S. at 497 n.5, 512. Under *Cox*, the key question is not the correctness of the challenged state-court decision, but instead the potential harm that would result from delaying review. See *Belknap*, 463 U.S. at 497 n.5.[2]

---

[2] Respondents' reliance (at Opp. 3) on *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120 (1945), *Market Street Ry. Co.* v. *Railroad Comm'n*, 324 U.S. 548 (1945), and *Jefferson* v. *City of Tarrant*, 522 U.S. 75 (1997), is misplaced. In *Radio Station WOW*, the Court granted immediate review despite ongoing state-court proceedings because the case fit within the Court's "penumbral" conception of finality. 326 U.S. at 124, 127. *Market Street* simply did not address whether pending state-court proceedings precluded immediate review; the dictum respondents quote from the opinion stands for the unremarkable proposition that a federal question must have been finally decided by the state court in order to be ripe for review, ***not*** for the much broader (and incorrect) principle that a state-court decision is not final if there are ***any*** state-court proceedings yet to come. Cf. *Cox*, 420 U.S. at 477-484. Finally, the analysis in *Jefferson* was restricted to theories of finality that do not apply in this case, and did not extend to the *Cox* test relied on here. See Petitioners' Reply Brief at 3-4, 1997 WL 471826, *Jefferson* v. *City of Tarrant*, No. 96-957 (U.S. Aug. 15, 1997). In *Jefferson*, the Alabama Supreme Court had reversed the state trial court's denial of judgment on the pleadings on the petitioners' federal law claims. See 522 U.S. at 78-80. Reversal by this Court — which would have permitted the petitioners to pursue their federal law claims in state court — would not have been "preclusive of any further litigation on the relevant cause of action." *Cox*, 420 U.S. at 482-483. Thus, the jurisdictional test at issue here could not have applied in *Jefferson*, and that decision has no bearing on this Court's jurisdiction to grant immediate review.

Thus, this case easily satisfies the four *Cox* requirements for immediate review. An exercise of jurisdiction would be an entirely unexceptional application of this Court's longstanding precedent.

II. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THE COURTS OF APPEALS AND THIS COURT

As petitioner explained in its opening brief (at Pet. 13-18), the Pennsylvania Supreme Court's decision conflicts with numerous holdings by the courts of appeals, including the Third Circuit's holding in *Dukes* v. *U.S. Healthcare, Inc.*, 57 F.3d 350 (3d Cir.), cert. denied, 516 U.S. 1009 (1995). Respondents' attempt to distinguish these cases is utterly without merit.

Respondents argue that there is no conflict between the Pennsylvania Supreme Court's decision and *Dukes* because *Dukes* involved the issue of complete preemption for removal purposes under Section 502(a) of ERISA, rather than preemption under Section 514(a), the provision applicable here. But, as respondents themselves concede (at Opp. 8), "[w]here a claim is completely preempted under §502(a), it is necessarily preempted under §514(a)." Thus, the *Dukes* holding that ERISA Section 502(a) preempts negligence claims against HMOs arising from the administration of benefits under a plan is irreconcilable with the Pennsylvania Supreme Court's holding that Section 514(a) does not. As recognized in *Huss* v. *Green Spring Health Services, Inc.*, 1999 U.S. Dist. LEXIS 5101, at *3 (E.D. Pa. April 16, 1999), the decision below creates an unseemly intrastate conflict between state and federal courts in Pennsylvania.

The Pennsylvania Supreme Court's decision also conflicts with numerous other courts of appeals decisions, both pre- and post-*Travelers*. See Pet. 15-17. Contrary to respondents' arguments, *Bast* v. *Prudential Ins. Co. of America*, 150 F.3d 1003 (9th Cir. 1998); *Engelhardt* v. *Paul Revere Life Ins. Co.*, 139 F.3d 1346 (11th Cir. 1998); *Turner* v. *Fallon Community Health Plan, Inc.*, 127 F.3d 196 (1st Cir. 1997), cert. denied, 523 U.S. 1072 (1998); and *Painter* v. *Golden Rule Ins. Co.*, 121 F.3d 436 (8th Cir.1997), cert. denied, 523 U.S. 1074 (1998), all involved merits preemption under Section 514(a), not just complete preemption under Section 502(a). Indeed, the Pennsylvania Supreme Court expressly

acknowledged that these cases applied Section 514(a) to preempt negligence claims arising from the administration of claims for benefits under an ERISA plan, but declared that "it would be inappropriate for us to utilize the reasoning of these courts of appeal cases as they fail to discuss the *Travelers* line of decisions." Pet. App. 11a n.5. In any event, for the reasons that petitioner has already explained, the conflict between these cases and the decision below is not lessened simply because they relied on Section 502(a), rather than Section 514(a), to find preemption.

Respondents also contend that these decisions do not conflict with the Pennsylvania Supreme Court's decision because they involved claims based on alleged improper processing of ERISA plan benefits rather than an HMO's "negligen[ce] in arranging for and providing medical care." Opp. 9. Respondents suggest that it is petitioner's failure to give adequate treatment, not its administration of plan benefits, that gives rise to potential liability. But the ***sole*** basis for petitioner's alleged liability in this case is its refusal of coverage for treatment at a non-participating hospital. See Pet. App. 3a-4a, 22a, 37a; 60a.[3] Respondents' suggestion that the negligence claim against petitioner challenges the quality of medical care it arranged rather than its alleged wrongful administration of plan benefits is factually incorrect,[4] and their attempt to distinguish on this basis the holdings of other courts and thereby minimize the sharp conflict in the courts below is accordingly unsound.

---

[3] In their Counterstatement of the Case, respondents assert that petitioner was alleged to have negligently failed to transfer (or delayed in transferring) Basile Pappas to a hospital capable of treating him in a timely manner. Opp. 1-2. This assertion is incorrect. Although Haverford Community Hospital's Third-Party Complaint against petitioner incorporates the Pappases' allegations that the ***Hospital*** and its agents were negligent in failing to transfer Pappas, it contains ***no*** allegations of wrongdoing by petitioner — either directly or by incorporation — other than the allegation that petitioner refused to authorize coverage at a non-participating hospital. Pet. App. 60a, ¶ 7.

[4] The Pappases did not alleged that the participating hospital to which Basile Pappas was ultimately transferred rendered inadequate care to him.

Significantly, respondents concede that, "[i]n the past, lower court decisions with respect to the extent of ERISA §514(a) pre-emption have varied markedly and incompatibly." Opp. 11. They contend, however, that "nearly all" inconsistent rulings preceded *Travelers*, and that *Travelers* gave "clear direction" to the lower courts in this area. *Ibid.* That assertion is belied by their acknowledgment elsewhere that this Court has yet to address the issue of ERISA preemption of negligence claims against HMOs. *Id.* at 6. Moreover, the conflicting rulings cited by petitioner and respondents and the articles cited by both parties[5] further confirm the pressing need for this Court's guidance in this important and oft-litigated area.

Respondents' conclusory argument that there is no conflict between the decision below and this Court's ERISA precedents is no more successful than their attempt to minimize the conflict in the lower courts. Tellingly, they do not even attempt to reconcile the Pennsylvania Supreme Court's decision with this Court's decisions in *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987), *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985), and *Shaw*, 463 U.S. at 96. Indeed, respondents simply say nothing about *Pilot Life*, *Metropolitan Life*, or *Shaw*, apparently cognizant that any effort to demonstrate fidelity by the Pennsylvania Supreme Court to those decisions would be futile.

In fact, the Pennsylvania Supreme Court freely conceded that it was not following *Pilot Life*, *Metropolitan Life*, or *Shaw*, since it viewed those decisions as "superannuated." Pet. App. 9a. It sought to justify its refusal to abide this Court's precedents by asserting that "*Travelers* and its progeny have thrown the expansive holdings of those earlier cases into question." Pet. App. 10a-11a. But as petitioner has previously noted, this Court has instructed lower courts that they should not anticipate the overruling of this Court's precedents: "Our decisions remain binding precedent until

---

[5] See Pet. 20-21; Opp. 11-12; see also Karen A. Jordan, *Travelers Insurance: New Support for the Argument to Restrain ERISA Preemption*, 13 YALE J. ON REG. 255, 304 (1996) ("[T]he outcomes on the issue of ERISA pre-emption have been inconsistent — indeed, the situation might be characterized as one of utter confusion on the issue.").

we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn* v. *United States*, 524 U.S. 236, 252-253 (1998). In *Pilot Life*, this Court expressly stated that "common law causes of action * * * based on alleged improper processing of a claim for benefits under an employee benefit plan, undoubtedly meet the criteria for pre-emption under § 514(a)." 481 U.S. at 48. Here, petitioner made a routine benefits determination that coverage would be provided to Mr. Pappas if he was transferred to any of three designated participating hospitals, but not if he was transferred to Jefferson, which had no contractual relationship with petitioner. *Pilot Life* should have compelled the conclusion that the claims against petitioner for its alleged negligence in administering benefits under Mr. Pappas's ERISA-governed plan were preempted under Section 514(a), and the Pennsylvania Supreme Court's express refusal to follow that decision warrants the grant of certiorari.

The Pennsylvania Supreme Court broadly held that "negligence claims against a health maintenance organization do not 'relate to' an ERISA plan." Pet. App. 11a. That sweeping holding not only conflicts with this Court's precedents, but also rewrites Section 514(a) of ERISA in a manner rejected by Congress. During the recent debate on the Patients' Bill of Rights Act of 1999 (S. 1344), the Senate refused to adopt proposed amendments (Nos. 1246 and 1249) that would have amended Section 514 to allow personal injury suits against HMOs.[6] 145 CONG. REC. S8524, S8527 (daily

---

[6] In pertinent part, these amendments to Section 514 of ERISA would have provided that:

> nothing in this title shall be construed to invalidate, impair, or supersede any cause of action under State law to recover damages resulting from personal injury or for wrongful death against any person
>
> (1) in connection with the provision of insurance, administrative services, or medical services by such person to or for a group health plan; or
>
> (2) that arises out of the arrangement by such person for the

ed. July 14, 1999). Clearly, if Section 514(a) of ERISA already permits the assertion of all manner of negligence claims against HMOs, as held by the court below, the Senate proponents of the amendments cited above would not have deemed it necessary to introduce their amendments. What's more, the Senate's refusal to adopt the amendments provides compelling evidence of the fundamental incompatibility between the evisceration of ERISA preemption effectuated by the Pennsylvania Supreme Court's decision and the intentions of Congress. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 441-443 (1987).

It is the exclusive province of Congress to enact any amendments to Section 514 that might be deemed appropriate. See, *e.g.*, *Corcoran* v. *United Healthcare, Inc.*, 965 F.2d 1321, 1338-1339 (5th Cir.) ("Fundamental changes such as the widespread institution of utilization review would seem to warrant a reevaluation of ERISA * * *. Our system, of course, allocates this task to Congress, not the courts * * *."), cert. denied, 506 U.S. 1033 (1992). The decision of the Pennsylvania Supreme Court, by sanctioning a radical contraction in the reach of Section 514(a), usurps Congress' role in crafting legislation and thereby necessitates this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

provision of such insurance, administrative services, or medical services by other persons.

145 CONG. REC. S8524, S8527 (daily ed. July 14, 1999).

Respectfully submitted.

BURT M. RUBLIN
BALLARD SPAHR ANDREWS &
INGERSOLL, LLP
1735 Market Street
Philadelphia, PA 19103
(215) 665-8500

ROY T. ENGLERT, JR.
Counsel of Record
SHARON SWINGLE
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3000

JULY 1999